Supreme Court, U.S.
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No. 96-20

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CARIBBEAN PETROLEUM CORPORATION,
Petitioner,
v.
COASTAL FUELS OF PUERTO RICO, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

> Coastal Fuels of Puerto Rico, Inc., a Delaware corporation, is a subsidiary of Coastal Fuels Marketing, Inc., a Delaware corporation. Coastal Fuels Marketing, Inc. is a subsidiary of Cosbel Petroleum Corporation, a Delaware corporation, which is a subsidiary of The Coastal Corporation, a publicly traded Delaware corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

For nearly 50 years, since this Court's decision in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), this Court has consistently held that, for purposes of "secondary-line" price discrimination cases under Section 2a of the Robinson-Patman Act amendments to the Clayton Act, injury to competition may be proven by persistent and substantial price discrimination that causes actual injury. See *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990); *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983). This Court recently addressed the requirements for showing injury to competition in the context of "primary-line" discrimination. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Since *Brooke Group*, however, the courts of appeals that have addressed secondary-line discrimination are unanimous in holding that the standards for secondary-line discrimination " 'stands on an entirely different statutory footing' " than primary-line discrimination and re-

main unaffected by *Brooke Group*. Pet. App. 13a (quoting *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995)). Rather than address the statutory analysis of the lower courts, petitioner offers policy arguments for a different rule. Those arguments should be directed to Congress, not this Court. Indeed, those arguments are all the more misplaced because this case, which contains uncontroverted evidence of the direct exercise of monopoly power and which rests ultimately on a decision of state law, is an inappropriate vehicle for addressing the policy issue petitioner seeks to raise.

COUNTERSTATEMENT OF THE CASE

To understand the competitive effect of petitioner's price discrimination, a more complete account of the relevant facts is necessary than that set forth in the petition.

FACTUAL BACKGROUND

This case involves the sale of marine fuel oil (also known as "bunker fuel") in San Juan, Puerto Rico. Marine fuel oil is a blend of highly viscous residual fuel oil and diesel oil, and comes in varying grades depending on the proportions of residual and diesel that are used. Marine fuel is purchased by cruise ships and other ocean-going vessels from suppliers such as petitioner Coastal Fuels of Puerto Rico, Inc. ("Coastal"), which deliver the fuel portside to the vessels. The suppliers, in turn, purchase residual fuel oil and diesel fuel from a refinery, and then blend it to meet their customers' specifications.

At the time relevant to the price discrimination at issue in this lawsuit (1991-93), San Juan Harbor was the home port for increasing numbers of cruise ships. A.2284.* For

* All citations to "A." refer to the Appendix filed in the court of appeals below. All other record citations refer to materials which appear elsewhere in the record below. Citations to "Pl.'s Ex." refer to the exhibits submitted by plaintiff, and citations to "Wales, Coastal Addendum" refer to the deposition of Robert Wales (Dec. 7, 1993).

a variety of reasons, cruise ships preferred to purchase bunker fuel in their home port in between trips. *Id.* Nevertheless, within the constraints of their individual itineraries, cruise ships could arrange to refuel in other ports. A.301-02.

Marine fuel suppliers in San Juan purchased the residual and diesel fuel they needed to serve such ships from petitioner Caribbean Petroleum Corp. ("CAPECO"). Located in San Juan, CAPECO was a large refiner of crude oil that produced about 15,000 barrels of residual fuel each day. A.1682-84. It sold about 5,000 barrels a day to an electric utility and to other inland customers, and the remainder to marine fuel suppliers. A.1951-54; Wales, Coastal Addendum 8-9. Any residual CAPECO could not sell in Puerto Rico had to be exported at a lower profit in light of transportation costs. A.302-03.

CAPECO's refinery was the only practical source for residual and diesel fuel for suppliers in San Juan. First, the other Puerto Rico refinery was not close to San Juan and rarely had residual fuel oil available for sale as bunker fuel. A.1083; A.1295-96. Indeed, it, like the bunker fuel suppliers, purchased residual from CAPECO. *Id.*

Second, and more importantly, the costs of importing supply from elsewhere were prohibitive. A.826-34; A.1399-1400. Among these costs were transportation costs of approximately $1.00 per barrel (A.1135), storage costs of roughly 30 cents per barrel (A.1066), and a Puerto Rico import tax of $5.00 per barrel which was levied on all imported fuel that was not sold within fifteen days of being imported. A.1063-64. When combined with the import tax, the highly volatile nature of bunker fuel prices made reliance on sources of supply outside of Puerto Rico impracticable. A supplier that imported fuel faced the very real prospect of losses because the intense pressure to sell within fifteen days to avoid the crushing effect of the import tax would, in a

declining market, force sales at losses to avoid even greater losses caused by the tax. A.1278-81; A.2083.

In 1989, Coastal Fuels Marketing, Inc. ("CFMI"), after closely studying competitive conditions in San Juan, formed respondent Coastal to sell bunker fuel in San Juan. Based on CFMI's 84 years of experience in the marine fuel oil business, Coastal produced a business plan which showed that it would prosper in San Juan Harbor, and capture approximately 25-30% of the sales volume there, if it could obtain an average gross margin (*i.e.*, sales revenues less product costs) of $1.65 a barrel. A.1256-63.

CAPECO supplied the two existing suppliers in San Juan, Caribbean Fuel Oil Trading, Inc. ("Caribbean") and Harbor Fuel Services, Inc. ("Harbor"), with 90% of their fuel oil. A.1159. In order to have any hope of surviving in San Juan, Coastal had to be able to purchase supply from CAPECO on the same terms and conditions as Harbor and Caribbean received. A.817-18; A.834. This was true for two reasons. First, as noted above, Coastal had no practical alternative to CAPECO to turn to for supplies of residual and diesel fuel. Second, competition within San Juan Harbor for the sale of bunker fuel was keen. A mere five cents per barrel price differential was competitively significant within the Harbor. A.826. In this climate, it was essential that marine fuel suppliers obtain residual fuel oil and diesel oil on the same terms and conditions as their competitors. *E.g.*, A.826-34; A.1399-1400.

Despite the obstacles that suppliers faced in relying on imported supplies of residual and diesel fuel, CAPECO was concerned that Coastal, a subsidiary of a larger corporation with an affiliated refinery in Aruba, might succeed in challenging CAPECO's monopoly position. Wales, Coastal Addendum 7-8. To preclude any adverse affect upon itself from this perceived threat, CAPECO initially offered to sell Coastal all of its daily production of fuel oil. *Id.* at 2-3; A.1595; A.860-62; A.1164. When

Coastal rejected that proposal, CAPECO promised to supply Coastal on equal terms as the other suppliers. A.847-48; A.850-53; A.865-68. Coastal's entry was delayed from 1989 until October 1991, because of the Gulf War. Pl.'s Ex. 17; A.847-53. For Coastal's first six months of operations (from October 1991 to March 1992), CAPECO agreed to charge Coastal prices based on a formula involving the previous Thursday/Friday New York market postings, minus a volume-based discount of up to 25 cents per barrel. A.1940-41; A.1694-95. Coastal understood, based upon CAPECO's assurances, that it would receive residual and diesel fuel from CAPECO on the same terms and conditions as its competitors. A.865-68. Despite CAPECO's assurances, CAPECO never supplied Coastal on the same basis as the others. A.1761.

Initially CAPECO effectively charged Coastal a higher price than its competitors by not enforcing contract provisions reducing the discount by 10 cents per barrel when, as almost always occurred, Caribbean and Harbor failed to meet the volume of sales required of them by contract —an indulgence CAPECO denied Coastal—and by refusing to make volumes available to Coastal that would qualify for the volume discounts. A.1661-63. As a result of the disparate treatment, in October and November 1991, CAPECO's price to Caribbean and Harbor effectively was the formula-base less a 25 cent per barrel discount, whereas CAPECO's price to Coastal was the formula-base minus 6¼ cents per barrel. Pl.'s Ex. 311.

Soon, CAPECO dispensed with even the appearance of equal pricing in favor of a more aggressive pricing strategy. During December 1991 alone, for example, CAPECO granted Caribbean and Harbor each per barrel discounts of 50 cents. Pl.'s Ex. 92. In January 1992, CAPECO granted Coastal's competitors an even steeper discount of $1.52 per barrel. Pl.'s Ex. 311. No such discounts were offered to Coastal. A.1089-90, A.1099.

Caribbean and Harbor passed on, in full, the discriminatory discounts CAPECO provided them to consumers. A.1281; A.2300-01; A.2309. To avoid further losses of sales in the face of CAPECO's unrelenting price discrimination, Coastal had no choice but to match the price cuts and lose profits in the process. A.1392-93; A.1416; A.2309-12. The result was that Coastal was selling bunker fuel at or near its cost of acquiring it from CAPECO on the discriminatory terms CAPECO offered.

Importantly, all of these discriminations in price occurred under market conditions where a mere 5 cent per barrel price differential was competitively significant within San Juan Harbor. A.826. This price discrimination—which totaled a staggering $682,451.78 from October 1991 to April 1992 (A.1964-65)—remained above competitively significant levels throughout the entire eighteen months Coastal was in business. A.1380-98; Pet. App. 16a-17a.

Coastal filed this suit in May 1992, when it learned of CAPECO's price discrimination. The district court denied Coastal's motion for injunctive relief in September 1992, and the court of appeals affirmed in April 1993. By that point, the cumulative effect of CAPECO's relentless price discrimination from October 1991 until April 1993 had become disastrous. All told, Coastal sustained actual losses of more than $2 million from October 1991 to April 1993, when—after the denial of injunctive relief was affirmed—Coastal went out of business. A.876-79.

PROCEDURAL BACKGROUND

In its complaint, Coastal alleged that CAPECO had (1) discriminated in price in violation of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), and in violation of the Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico tit. 10, § 263(a); (2) engaged in monopolization in violation of Section 2 of the Sherman Act and Section 260 of Title 10 of the

Laws of Puerto Rico; (3) injured Coastal through tortious and unfair business practices in violations of Puerto Rico law; and (4) breached its contract with Coastal. The jury, in answering special interrogatories under Fed. R. Civ. P. 49(a), found in favor of Coastal on all counts except the claim for breach of contract. The jury awarded $1,500,000 in damages for the antitrust violations and another $500,000 in damages for the Puerto Rico tort violation. The antitrust damages were trebled (see 15 U.S.C. § 15(a); Laws of Puerto Rico tit. 10, § 263) for a total award of $5,000,000, and the district court entered judgment for Coastal in that amount. CAPECO appealed.

In a lengthy opinion filed by Chief Judge Torruella, a unanimous panel of the United States Court of Appeals for the First Circuit affirmed in part, reversed in part, and remanded. 79 F.3d 182 (1996) (Pet. App. 1a). As for the claims other than the price discrimination claims, the court affirmed both the finding of liability and award of damages on the Puerto Rico business tort claim, but reversed the monopolization verdict under Puerto Rico law and Section 2 of the Sherman Act.

With regard to the price discrimination verdict, the court of appeals reversed the finding that CAPECO violated Section 2(a) of the Robinson-Patman Act because none of the discriminatory sales crossed a state line and thus did not satisfy the statute's "in commerce" requirement. Pet. App. 8a-9a. The court sustained liability for price discrimination, however, under the Puerto Rico Anti-Monopoly Act of 1964. Relying upon federal price discrimination as a "guide" (Pet. App. 10a), the court of appeals began its state law price discrimination analysis by drawing the familiar distinction between "primary-line" and "secondary-line" price discrimination claims:

> A 'primary-line' violation occurs where the discriminating seller's price discrimination adversely impacts competition with the seller's direct competitors. . . . In

> contrast, a 'secondary-line' violation occurs where the discriminating seller's price discrimination injures competition among his customers, that is, purchasers from the seller.

Pet. App. 6a (citations omitted).

Given that the case was tried to the jury on the theory that CAPECO's price discrimination had injured competition between suppliers of marine fuel oil, the court of appeals properly analyzed the case as one of secondary-line price discrimination. The court drew the relevant standards from *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), in which this Court "[a]ddressed the burden of the secondary-line plaintiff." Pet. App. 6a. The court noted that in three cases—*Morton Salt*, *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) and *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 559 (1990)—"the Supreme Court has held that 'for purposes of section 2(a) [of the Robinson-Patman Act], injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time.'" Pet. App. 11a-12a (quoting *Falls City*, 460 U.S. at 435).

CAPECO argued in effect that *Morton Salt* was overruled *sub silentio* by *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In *Brooke Group*, this Court ruled that a plaintiff in a case of "primary-line price discrimination" must meet the strict standards for establishing a predatory pricing monopolization claim under the Sherman Act. *Id.* at 222. The court of appeals, in agreement with "the two other circuits that have addressed competitive injury in secondary-line cases since *Brooke Group*," declined to depart from *Morton Salt*, *Falls City*, and *Texaco Inc.* v. *Hasbrouck*. Pet. App. 13a & n.7 (following *Stelwagon Manufacturing Co.* v. *Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), and *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995)).

The court explained that primary-line cases, such as *Brooke Group*, arise under the original Clayton Act, which only proscribes price discrimination "that might 'substantially . . . lessen competition or tend to create a monopoly in any line of commerce.' " Pet. App. 13a (quoting Clayton Antitrust Act, § 2, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 13(a))). Secondary-line discrimination such as this case, by contrast, arises under the 1936 Robinson-Patman Act amendments to the original Clayton Act, which added new statutory language intended "to relieve secondary-line plaintiffs . . . from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects on individual competitors." Pet. App. 15a. The Robinson-Patman Act amended the competitive injury requirement under the original Clayton Act to permit secondary-line cases to go forward upon the showing of a substantial tendency "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of [unlawful price] discrimination." 49 Stat. 1526 (codified at 15 U.S.C. § 13(a)). The differences between the text and legislative intent of the Robinson-Patman Act and the original Clayton Act, the court of appeals concluded, "directly support[] maintaining the *Morton Salt* rule" in secondary-line cases. Pet. App. 15a. The First Circuit, accordingly, declined to read *Brooke Group* as overruling this Court's well-established interpretation of statutory language not at issue in that case.

Applying *Morton Salt* as guidance in analyzing the evidentiary sufficiency of the Puerto Rico price discrimination verdict, the court ruled that the price discrimination verdict was proper unless CAPECO had rebutted the presumption of competitive injury with " 'evidence breaking the causal connection between a price differential and lost sales or profits.' " Pet. App. 16a (quoting *Falls City*, 460 U.S. at 435). CAPECO had not adduced such

evidence, the court ruled. Pet. App. 17a-18a. Moreover, the court stated that the jury was entitled to credit Coastal's evidence that CAPECO's price discrimination had caused Coastal to lose profits because "Caribbean and Harbor had fully passed on their lower costs to the ships purchasing marine fuel." Pet. App. 21a. For these reasons, the court of appeals affirmed the finding of illegal price discrimination "under Title 10, Section 263 of the Laws of Puerto Rico." Pet. App. 19a. Nevertheless, the court vacated and remanded the antitrust damages award for further proceedings. The issue of whether the pre-trebled damages award of $1,500,000 is supported by the evidence of injury and losses attributable to price discrimination alone is now pending before the district court.

REASONS FOR DENYING THE PETITION

I. AS EVERY COURT OF APPEALS TO ADDRESS THE QUESTION HAS RULED, THE STANDARD FOR PROVING INJURY TO COMPETITION SET FORTH IN *MORTON SALT* AND REAFFIRMED IN *FALLS CITY* AND IN *TEXACO* v. *HASBROUCK* WAS NOT OVERRULED *SUB SILENTIO* IN *BROOKE GROUP*.

No court of appeals has yet accepted petitioner's principal argument, which is that the test for injury to competition for secondary-line price discrimination, first set forth in *Morton Salt* and reaffirmed in *Falls City* and in *Texaco Inc.* v. *Hasbrouck*, was overruled by implication in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Two courts of appeals (including the court below) have weighed in on that question. See Pet. App. 13a & n.7; *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 515 (1995). Both concluded that neither the terms nor the reasoning of *Brooke Group* applies to

secondary-line cases under the Robinson-Patman Act and that such cases, accordingly, remain governed by *Morton Salt*. A third court of appeals has simply applied *Morton Salt* without discussion of *Brooke Group*. *Stelwagon Mfg. Co.* v. *Tarmac Roofing Sys., Inc.*, 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996). There is thus no conflict among the courts of appeals on the central issue raised by the petition.

Remarkably, petitioner nowhere addresses, let alone refutes, the statutory analysis upon which both the Ninth Circuit and the First Circuit expressly relied in rejecting petitioner's reading of *Brooke Group*. Petitioner not only ignores the plain terms of the Robinson-Patman Act and the clearly expressed intent of Congress in passing the Act, but overreads this Court's carefully limited opinion in *Brooke Group*.

1. The first problem with petitioner's argument is straightforward: the opinion in *Brooke Group* carefully noted that it addressed the proper standards only for primary-line discrimination cases. *Brooke Group* involved a claim that a competing cigarette manufacturer, displeased with the success of a price-cutting rival in a low-cost segment of the cigarette market, priced predatorily (*i.e.*, below cost) in that market for the purpose of disciplining the maverick back into compliance with the oligopoly. The Court observed at the outset that Liggett had asserted a theory of "primary-line injury." 509 U.S. at 220. This characterization dictated which precedents the Court looked to for guidance—the Court looked for guidance not to *Morton Salt*, a secondary-line case, but rather to *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), which the Court described as the case in which it "last addressed primary-line injury." 509 U.S. at 220. The Court concluded that in the intervening two decades since *Utah Pie*, "it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury

inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act." *Id.* at 221.

The remainder of the Court's opinion was similarly limited to primary-line discrimination cases. See, *e.g.*, *id.* at 222 (describing common "prerequisites to recovery" on claims of "predatory pricing under § 2 of the Sherman Act or primary-line price discrimination"); *id.* at 229 (rejecting court of appeals' suggestion that "primary-line injury [which] occurs in an oligopoly setting" cannot violate the Robinson-Patman Act). Therefore, notwithstanding petitioner's puzzling statement that "the Court in *Brooke Group* did not limit its interpretation of the Robinson-Patman Act to primary line cases" (Pet. 10 n.6), it is perfectly clear that the Court's ruling was limited to that context.

2. More fundamentally, the text and statutory history of the Robinson-Patman Act amendments to the original Clayton Act preclude the analogy to the Sherman Act which the Court in *Brooke Group* relied upon as to primary-line cases. As the Ninth Circuit correctly explained in *Rebel Oil*, "[t]he Robinson-Patman Act stands on entirely different footing than the Sherman Act and Clayton Act." 51 F.3d at 1446.

Primary-line discrimination was first prohibited under the original Clayton Act, which was passed in 1914. As originally passed, the Clayton Act prohibited price discrimination that might "substantially lessen competition or tend to create a monopoly in any line of commerce." Clayton Act of 1914, § 2, 38 Stat. 730. The Robinson-Patman Act amendments were passed in 1936 out of frustration with the inability of the original Clayton Act to remedy the perceived unfairness of large retailers obtaining price advantages over their smaller rivals by securing quantity discounts for buying in large volumes. See *Morton Salt*, 334 U.S. at 43; H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3-4 (1936); S. Rep. No. 1502, 74th

Cong., 2d Sess. 4 (1936). Congress responded by adding the following critical phrase to the end of the Clayton Act: "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination." As the text of the amendment indicates, no longer would proof of injury to competition as defined by the original Clayton Act be required in secondary-line cases. Rather, by adding the modifying phrase "with any person . . ." (which petitioner overlooks in its fixation on the word "competition," see, *e.g.*, Pet. 10-12 & n.6), Congress amended the statute to permit a disfavored purchaser in a secondary-line case to demonstrate injury to competition by showing injury to the disfavored purchaser's ability to compete with the favored purchaser.

The courts of appeals below, like the Ninth Circuit in *Rebel Oil,* correctly perceived the full significance of the unique language and history of the Robinson-Patman Act amendments of 1936 in comparison with other antitrust laws: "[T]he amendment to the Clayton Act effected by the Robinson-Patman Act supports the continued vitality of the *Morton Salt* rule, even in the face of *Brooke Group*'s alteration of standards for primary-line price discrimination." Pet. App. 15a; see also 51 F.3d at 1446. In the absence of any conflicting authority within the circuits, and of any contrary statutory analysis by the petitioner, there is no reason for this Court to address the question presented.

II. THERE ALSO IS NO CIRCUIT SPLIT ON WHETHER INJURY TO COMPETITION MAY BE INFERRED FROM PROLONGED AND SUBSTANTIAL PRICE DISCRIMINATION; SINCE 1948 THIS COURT HAS RULED TIME AND AGAIN THAT COMPETITIVE INJURY MAY BE SO INFERRED.

Petitioner strives mightily (Pet. 9-11) to demonstrate a conflict among the circuits on the question "whether injury to competitors alone [i]s sufficient to establish lia-

bility in private party actions for money damages in secondary line price discrimination cases" (Pet. 9). The attempt falls woefully short of the mark, however. First, there could be no such split. This Court has consistently ruled since 1948 that in secondary-line price discrimination cases, proof of substantial price discrimination which has persisted over time gives rise to a rebuttable presumption that competition has been injured. Second, petitioner misreads the cases from the circuits, none of which have departed from this Court's authoritative rulings in this area. Third, regardless of how the lower court cases are read, the court of appeals' rulings that sustained, competitively significant price discrimination occurred (Pet. App. 16a-17a) and that no sales "in commerce" were made (Pet. App. 8a-9a) make this an unsuitable case in which to revisit the *Morton Salt* rule.

1. The first and leading case in this Court's fifty-year line of precedents is *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). In *Morton Salt*, respondent sold its table salts under a quantity discount system available to all buyers who purchased stated volumes of salt. *Id.* at 41. The Federal Trade Commission ("FTC") issued a secondary-line price discrimination complaint under the Robinson-Patman Act charging that the discounts enabled the "Big Five" large national grocery store chains to underprice smaller retailers. The FTC ultimately found respondent liable for price discrimination, finding that "the competitive opportunities of [smaller] merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." *Id.* at 46-47. In this Court, respondent argued, among other things, that the FTC's cease and desist order be set aside because there had been no finding that the discounts injured competition. This Court rejected that contention and upheld the agency order.

The Court's analysis of the contention began by noting that the Robinson-Patman Act was premised upon "a belief that § 2 of the [original] Clayton Act had "been too restrictive, in requiring a showing of general injury to competitive conditions.'" *Id.* at 49 (quoting legislative history). It was felt that the original Clayton Act, by requiring proof of an injury to competition, failed to "protect[] small businesses which were unable to buy in quantities." *Id.* Congress's intent in enacting Robinson-Patman, this Court concluded, was "to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'" *Id.* (quoting legislative history). Then the Court delivered its penultimate ruling: "[W]e believe [it] to be self-evident . . . that there is 'a reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id.* at 50.

This Court has reaffirmed and applied the *Morton Salt* presumption of competitive injury ever since. One important example is *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), a case of tertiary-line price discrimination (*i.e.*, a case involving injury to competition at the level of the customers of a manufacturer's customers). In *Falls City*, a beer brewer sold beer at different prices, without cost-justification, to an Indiana wholesaler, Vanco Beverage, Inc., and a Kentucky wholesaler, Dawson Springs, Inc. ("Dawson"), which served adjoining counties in the two states. *Id.* at 431. Because Indiana law prohibited wholesalers from selling, and retailers from buying, beer out of state, Vanco and Dawson sold only to retailers in their respective counties. *Id.* at 432. Because Falls City sold in Kentucky at lower prices than in Indiana, beer prices at the retail level were lower in Kentucky, and Indiana customers in Vanderburgh County, Indiana drove across the state line into

Kentucky to buy beer. *Id.* Vanco sued Falls City for price discrimination, and the lower courts found Falls City liable in reliance on *Morton Salt.*

Insofar as relevant here, this Court unanimously upheld the lower courts' reliance on *Morton Salt.* The Court began by noting that *Morton Salt* does not dispense with Section 2(a)'s requirement of proof of harm to competition; rather, *Morton Salt* shows how the required injury to competition may be proven in a secondary-line case. *Id.* at 434-35. *Morton Salt,* the Court explained, "held that, for purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. . . . In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Id.* at 435 (citations omitted). Falls City argued that *Morton Salt* should be limited to cases involving " 'large buyer preference or seller predation.' " *Id.* at 436 (quoting Falls City's Brief). This Court brushed aside the challenge to "*Morton Salt*'s 'self-evident' inference" of competitive injury, noting tersely that "[t]he determination whether to alter the scope of the [Robinson-Patman] Act must be made by Congress, not this Court." *Id.* (quoting *Morton Salt,* 334 U.S. at 50).

Just a few years ago, in *Texaco Inc.* v. *Hasbrouck,* 496 U.S. 543 (1990), this Court again reaffirmed *Morton Salt. Hasbrouck* involved price discrimination claims filed by Texaco gasoline retailers whom Texaco supplied at prices higher than those it charged two wholesalers who also operated retail gas stations. *Id.* at 548-49. Texaco argued that regardless of *Morton Salt,* injury to competition can never result when differential prices are charged to purchasers at different levels of distribution. The lower courts rejected that sweeping argument as foreclosed by *Morton Salt,* and this Court unanimously agreed. The Court began its analysis of competitive injury with *Mor-*

ton Salt: "In *FTC* v. *Morton Salt Co.* . . ., we held that an injury to competition may be inferred from evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay.'" *Id.* at 559 (citation omitted; quoting *Morton Salt*, 334 U.S. at 46-47). "To the extent that [the favored wholesaler/retailers] competed with respondents in the retail market," the Court concluded, "the presumption of adverse effect on competition recognized in the *Morton Salt* case becomes all the more appropriate." *Id.* at 570. Notably, in *Hasbrouck*, as in the instant case, the favored competitors fully passed on the price discounts they received and did not provide any service to the seller that could justify those discounts as "functional."

2. As the cases cited above show, this Court has consistently ruled that, in secondary-line price discrimination cases, injury to competition may be proven by substantial price discrimination which persists over time. It therefore would be remarkable indeed if, as petitioner claims, this Court left uncorrected a circuit split over "the decades following *Morton Salt*." Pet. 9. Even cursory analysis of the cases petitioner cites as being in conflict (Pet. 9-11) shows that there is no conflict among the circuits on the vitality of *Morton Salt*. Instead, all of the cases recognize, as the District of Columbia Circuit declared shortly before *Hasbrouck*, that "[t]he *Morton Salt* inference is thus alive and well in the law." *Boise Cascade Corp.* v. *Federal Trade Comm'n*, 837 F.2d 1127, 1139 (1988).

Petitioner nevertheless attempts to draw a distinction between secondary-line cases that supposedly hinge Robinson-Patman liability on "injury to competitors, instead of competition," and cases that hold that "evidence of injury to competitors alone [i]s not enough." Pet. 9. In the former category, petitioner includes *Stelwagon Manufacturing Co.* v. *Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996); *Alan's of Atlanta, Inc.* v. *Minolta Corp.*, 903

F.2d 1414, 1418 & n.6 (11th Cir. 1990), and—incongruously—*Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 515 (1995), a primary-line case that discusses standards for secondary-line cases only in dicta; into the latter, petitioner places *Richard Short Oil Co.* v. *Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986), *Black Gold, Ltd.* v. *Rockwool Industries, Inc.*, 729 F.2d 676, 680-81 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984), and *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

At most, some of the cases contain statements which, if taken out of context, might appear conflicting. By describing conflicting statements in opinions as a circuit conflict under this Court's Rule 10, petitioner misapprehends the role of this Court. "This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297-98 (1956); see also, *e.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176, 185 (1988). The *judgments* in the cases cited by petitioner are entirely consistent.

a. It is true that *Stelwagon* and *Alan's of Atlanta* concluded that, in order to show injury to competition for purposes of secondary-line price discrimination under the Robinson Patman Act, a plaintiff is not required to make the same evidentiary showing of "restricting output and raising prices, *i.e.*, lowering consumer welfare," that is necessary to prove liability under the Sherman Act. *Alan's of Atlanta*, 903 F.2d at 1418 n.6; see also *Stelwagon*, 63 F.3d at 1271. In reaching that conclusion, these courts merely followed the holding in *Morton Salt* that the very purpose of Robinson-Patman was "to justify a finding of injury to competition by a showing of injury to the competitor victimized by the discrimination." 334 U.S. at 49 (internal quotation marks omitted); see also *Falls City*, 460 U.S. at 435. It is *not* true, however, that *Richard Short, Black Gold*, and *Foremost Pro Color* stand for any

contrary proposition; rather, in each case the court recognizes and applies, as it must, the same *Morton Salt* presumption explained and applied by the court below and by the courts in *Stelwagon* and *Alan's of Atlanta.*

b. Although the panel in *Richard Short* rejected the plaintiff's price discrimination claim for failure to show "injury to competition," the court left no doubt that by "injury to competition," it meant a prima facie showing under *Morton Salt,* not the Sherman Act concept of restricted output and higher prices. 799 F.2d at 420. The court explicitly noted, consistent with *Morton Salt,* that "[i]njury to competition is established by proof 'of a substantial price discrimination between competing purchasers over time.'" *Id.* (quoting *Falls City,* 460 U.S. at 435). In fact, the panel in *Richard Short* did not even reach the question of harm to competitors versus harm to competition because in that case the plaintiff had failed even to show harm to itself as a competitor which resulted from price discrimination. See *id.* at 421 ("No evidence was presented at trial that Short actually lost sales to any competing Texaco station as the result of the difference in prices; nor was there any evidence that Short ever lowered its prices and decreased its profits in order to compete with any lower price by a Texaco dealer.").

c. Petitioner similarly misreads *Black Gold.* In that case, two competing insulation installers, Williams Insulation Co. ("Williams"), and Black Gold, purchased insulation from Rockwool Industries. 729 F.2d at 678. Rockwool sold the same product to Williams for less than it charged Black Gold. *Id.* at 679. All of the discriminatory sales occurred in connection with a program sponsored by the Public Service Company of Colorado ("PSC") to enable residential homeowners to have their homes reinsulated, a program in which both Williams and Black Gold participated. *Id.* Black Gold eventually sued Rockwool under the Robinson-Patman Act, alleging that price discrimination had occurred in connection with the PSC

program. The court conceded that in the "usual competitive market," price differentials such as those charged by Rockwool "often" adversely affect competition. *Id.* at 681. The PSC program, however, was quite different.

The "unusual" feature of *Black Gold,* the court ruled, was that the PSC program (in connection with which the price differential had occurred, see *id.* at 681 n.3) was not a competitive market. *Id.* at 681. It was, in fact, quite the opposite: PSC set uniform prices from which no insulation installers could deviate, assigned all jobs on a rotating basis, and performed all of the promotional, collections and related activities competitors ordinarily have to fund out of sales revenues. *Id.* Because of these peculiarities of the PSC program, the effects of Rockwool's price discrimination were never reflected in prices. *Id.* This meant that Black Gold neither lost sales to Williams nor had to forgo, for lack of sufficient revenues, competitively necessary investments. *Id.* Consequently, the necessary predicate for the *Morton Salt* presumption—namely, an adverse "impact upon [the disfavored purchaser's] ability to compete"—was absent. *Id.*

The foregoing reveals *Black Gold* to be *sui generis,* unlike this case and *Alan's of Atlanta.* In this case, as in *Alan's of Atlanta,* uniform prices were not fixed, and customers were not "equitably" assigned to the favored and disfavored purchasers (on a "rotating basis" or otherwise). To the contrary, CAPECO's favored purchasers passed on to consumers, in full, the discriminatory price breaks they received; similarly, the favored purchaser in *Alan's of Atlanta* channeled the fruits of its price discrimination into advertising or service enhancements. In both cases, the discrimination led to diverted sales and lost profits for the disfavored purchasers. In short, quite unlike *Black Gold,* the instant case and *Alan's of Atlanta* each involved price discrimination that significantly compromised the disfavored purchaser's ability to compete. *Black Gold,* 729 F.2d at 681. Finally, the alleged con-

flict between *Black Gold* and *Rebel Oil* is specious—the former, as a secondary-line case (see 729 F.2d at 679), clearly does not conflict with *Rebel Oil*, which was a primary-line case. See *Rebel Oil*, 51 F.3d at 1445.

d. The last circuit court decision as to which petitioner claims a conflict is *Foremost Pro Color*. The plaintiff's relevant allegation there was that Eastman Kodak had violated the Robinson-Patman Act by "offering" a price discount to plaintiff's competitors but not to plaintiff. 703 F.2d at 547. No allegation was made that any price discrimination had actually occurred; the plaintiff merely claimed that a discriminatory price offer had been made. The court ultimately ruled that the plaintiff had failed to state a viable price discrimination claim because its incomplete allegations provided no basis for an "inference of injury to competition" under *Morton Salt*. *Id.* at 548. The case, therefore, stands for the uncontroversial proposition that injury to competitors does not give rise to a claim under the Robinson-Patman Act unless the *Morton Salt* definition of injury to competition is met. Any doubts on this score are dispelled by later rulings from the Ninth Circuit, which have squarely concluded that injury to competition is demonstrated in secondary-line cases when it is proven, pursuant to *Morton Salt*, that the plaintiff suffered losses as a result of substantial price discrimination over time. See *Rebel Oil*, 51 F.3d at 1446; *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1988), *aff'd*, 496 U.S. 543 (1990).

3. Finally, for two reasons this case does not present the purported tension between the Robinson-Patman Act and the Sherman Act that petitioner asserts. First, this is not a case in which liability was imposed in the absence of injury to competition, regardless of how such injury is measured. The court of appeals stated that "the discrimination lasted all 18 months that Coastal was in business, and always exceeded the five cents per barrel that witnesses testified was competitively

significant." Pet. App. 16a-17a. As explained more fully in Coastal's conditional cross-petition for certiorari, this evidence of sustained, competitively significant price discrimination is more than sufficient evidence of market power to support the jury's verdict of monopolization under Section 2 of the Sherman Act. Compare Pet. 14 & Pet. App. 16a n.9 (citing Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 14.6a, at 524 (1994)) with Hovenkamp, § 14.6a, at 524 ("persistent price discrimination cannot occur unless the seller has market power")). The facts therefore fully support a finding of injury of competition not only under the *Morton Salt* rule but under the Sherman Act as well, and would require affirmance of the price discrimination verdict regardless of the test used.

Second and more fundamentally, the petition, at bottom, presents an issue of Puerto Rico law for this Court to review. The court of appeals below *reversed* the Robinson-Patman Act claim (on jurisdictional grounds), and affirmed the price discrimination verdict under the Puerto Rico Anti-Monopoly Act. In upholding the state law claim, the court of appeals relied on federal law only "as a guide in applying the [Puerto Rico price discrimination] statute." Pet. App. 10a. Of course, there is no question that this Court has jurisdiction to review a lower federal court's decision of a state law issue, just as the district court properly has jurisdiction over the damages issues still pending upon remand. See Pet. App. 9a-10a. Nevertheless, as all the Justices agreed just last Term, for prudential reasons this Court will "not normally grant petitions for certiorari solely to review what purports to be an application of state law." See *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2072 (1996) (per curiam); see also *id.* at 2073 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting) ("It is contrary to our settled practice to grant a petition for certiorari for the sole purpose of deciding a state-law question ruled upon

by a federal court of appeals"); see also *Salve Regina College* v. *Russell*, 499 U.S. 225, 235 n.3 (1991).

Application of this principle is particularly appropriate here, because a court applying Puerto Rico law would likely adhere to the ruling in *Morton Salt* regardless of whether this Court chooses to do so under the Robinson-Patman Act. "The general rule is that adoption of the wording of a statute from another legislative jurisdiction carries with it the *previous* judicial interpretations of the wording." *Shannon* v. *United States*, 114 S. Ct. 2419, 2425 (1994) (emphasis added; internal quotation marks and editorial revisions omitted) (citing cases). Because Puerto Rico adheres to this general rule, a court applying Puerto Rico law would construe the Puerto Rico Anti-Monopoly Act, as a matter of state law, in harmony with cases such as *Morton Salt* that were decided before Puerto Rico adopted its antimonopoly statute in 1964. See *St. Paul Fire & Marine Ins. Co.* v. *Caguas Fed. Sav. & Loan Ass'n*, 867 F.2d 707, 711 (1st Cir. 1989); Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico tit. 10, § 263. Accordingly, a decision by this Court to abandon the statutory construction adopted in *Morton Salt* would merely be advisory in this case. Any such pronouncement should be reserved for a case involving live claims under the Robinson-Patman Act.

* * *

In sum, the scope of the rebuttable presumption of competitive injury established in *Morton Salt* is clear. The *Morton Salt* presumption applies where "substantial price discrimination between competing purchasers [has occurred] over time." *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). Petitioner has failed to identify a conflict on the issue warranting this Court's review, and this case in any event, is unsuitable as a vehicle to revisit *Morton Salt*.

III. THE COURT OF APPEALS CORRECTLY HELD PETITIONER LIABLE FOR VIOLATING THE ROBINSON-PATMAN ACT.

Petitioner briefly raises two additional reasons why it believes the court below erred. Neither has merit.

Petitioner's first point is that the decision below is inconsistent with the "antitrust injury" requirement of Section 4 of the Clayton Act. Pet. 15-16. In petitioner's view, lost profits and lost sales do not constitute antitrust injury because they are not indicative of injury to competition. *Id.* Petitioner cites no authority, let alone any circuit conflict, in support of this argument. The argument simply recasts, in terms of "antitrust injury," CAPECO's principal assault on the Court's longstanding interpretation of what constitutes "injury to competition" for purposes of secondary-line price discrimination under the Robinson-Patman Act. In any event, it is well settled that "lost sales or profits" caused by price discrimination in violation of Robinson-Patman constitute antitrust injury under Section 4 of the Clayton Act. *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983); see also *J. Truett Payne* v. *Chrysler Motors Co.*, 451 U.S. 557, 561-63 (1981).

Furthermore, the court below held that, on this record, respondent had produced enough proof to permit the "jury to reasonably infer actual injury in the form of lost sales." Pet. App. 20a. The amount of damages supported by the record is a question presently under submission to the district court on remand from the court below. Petitioner has asked the district court to order a new trial on damages. All of this means that the case, as it now stands, is interlocutory, which is yet another reason for denying certiorari at this time. See Robert L. Stern *et al.*, *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993) (citing cases).

Second, petitioner argues that respondent's losses were not causally related to the price discrimination. Pet. 17. That claim is not worthy of review on its face, and is in any event foreclosed by the evidence, which clearly shows that petitioner's discriminatory pricing caused respondent financial losses. Pet. App. 19a-21a.

IV. PETITIONER'S POLICY ARGUMENTS FOR REFASHIONING THE ROBINSON-PATMAN ACT SHOULD BE DIRECTED TO CONGRESS, NOT THIS COURT.

At bottom, petitioner presents nothing but policy arguments for overturning *Morton Salt* and its progeny. Adhering to the text of the Robinson-Patman Act amendments and this Court's long-standing interpretation of the statute, petitioner warns, will "undermine[] the competitive operation of the market, and threaten[] consumer interests" and "could lead to overenforcement and anticompetitive results." Pet. 18. This Court has steadfastly referred such arguments to the legislative branch of government in the past. The same response is appropriate here.

As this Court has noted in reaffirming *Morton Salt*, "[t]he determination whether to alter the scope of the [Robinson-Patman] Act must be made by Congress, not this Court." *Falls City*, 460 U.S. at 436; see also, *e.g.*, *Great Atl. & Pac. Tea Co.* v. *Federal Trade Comm'n*, 440 U.S. 69, 78 (1979) (rejecting "attempt to amend the Robinson-Patman Act judicially"). As Justice Scalia aptly noted in *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990), in rebuffing a policy argument in favor of narrowing the reach of the Robinson-Patman Act: "The short answer to this argument is that it should be addressed to Congress." *Id.* at 579 (Scalia, J., joined by Kennedy, J., concurring in judgment).

CONCLUSION

The petition for writ of certiorari should be denied.

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